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Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1990

REX A. SHARP, KEITH WILSON, JAMES H. MORAIN,
DANIEL H. DIEPENBROCK, and TAMMIE E. KURTH,
as individuals,

NEUBAUER, SHARP, McQUEEN,
DREILING & MORAIN, P.A., as a firm, and
ALL OTHER LAWYERS AS A CLASS REQUIRED
BY THE STATE OF KANSAS TO REPRESENT
KANSAS INDIGENT CRIMINAL DEFENDANTS,

Petitioners,

v.

THE STATE OF KANSAS,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

1. IS *STARE DECISIS* A SUFFICIENT JUSTIFICATION TO CONTINUE THE FICTION-BASED, EXCEPTION-RIDDLED ELEVENTH AMENDMENT DOCTRINE OF *HANS v. LOUISIANA*?
2. IF *HANS* IS STILL CONTROLLING CONSTITUTIONAL DOCTRINE, DOES 42 U.S.C. § 1994 FALL WITHIN THE CONGRESSIONAL ABROGATION EXCEPTION TO THE DOCTRINE?
3. IF *HANS* IS STILL CONTROLLING CONSTITUTIONAL DOCTRINE, DID THE STATES BY RATIFYING CONSTITUTIONAL AMENDMENTS SPECIFICALLY INTENDED TO LIMIT STATE ACTION WAIVE THE SOVEREIGNTY AFFORDED BY THE ELEVENTH AMENDMENT?
4. IF A FEDERAL COURT HAS JURISDICTION OVER FEDERAL QUESTIONS, MAY THE FEDERAL COURT ALSO MAINTAIN PENDENT JURISDICTION OVER STATE QUESTIONS INVOLVING A STATE'S NON-DISCRETIONARY CONDUCT?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for
the Tenth Circuit is unreported, but is set forth in Appen-
dix 1.

The ruling of the United States District Court for the District of Kansas is unreported, but is set forth in Appendix 2.

JURISDICTION

Jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit filed and entered May 7, 1990, is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitutional Provisions

amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

amend XI provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of

the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

amend. XIII provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.

amend. XIV provides in relevant part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws. . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Statutes

42 U.S.C. Section 1944 provides:

The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions; orders; regulations; or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of

which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons or peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.

STATEMENT OF THE CASE

This is a class action suit brought by rural Kansas lawyers seeking damages for past violations of their constitutional rights under the Indigent Defense Service Act, rules, and regulations ("Act"), which imposed a court appointment system that was held unconstitutional by the Kansas Supreme Court in *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987) (7-0 decision) ("Smith").

The *Smith* court held:

1. Although Kansas lawyers had an ethical obligation to provide *pro bono* services, the State had the legal duty to provide counsel for indigent criminal defendants, and the "State had an obligation to compensate attorneys appointed." *Id.* at 350-61.
2. "Attorney's services are property . . . subject to Fifth Amendment protection", and since the Act did not provide just compensation, "the system violates the Fifth Amendment." *Id.* at 370.
3. The Act violated the equal protection clause because (a) it treated lawyers differently from other professionals by requiring lawyers to subsidize indigent criminal defense; and (b) it treated lawyers differently depending on their geographic location by requiring

rural lawyers (only 35% of the Kansas bar) to represent indigent criminal defendants while urban lawyers were not required to donate any of their time or money to indigent criminal defense, instead publicly paid defenders were provided in the urban areas. *Id.* at 373-77.

4. The Act "on its face does not violate [substantive] due process . . . , [but] the application or administration . . . could render it unreasonable and arbitrary." *Id.* at 363.

5. The Act did not violate the Thirteenth Amendment because no Kansas attorney faced imprisonment for refusing a court appointment. *Id.* at 378.

6. The Act violated Kan. Const. art. 2, Sec. 17 because it did not operate uniformly throughout the State, rather country lawyers were court appointed and lawyers in large, urban counties were not. *Id.* 381-83.

Therefore, the *Smith* court struck down the Act, but required the country lawyers to continue representing indigent criminal defendants for another 6 1/2 months while the State took legislative or administrative action to comply with the Constitution. *Id.* at 383.

With no State action being taken, Plaintiffs, invoking federal question jurisdiction under 28 U.S.C. Sec. 1331, filed this suit in federal court seeking injunctive relief, just compensation, and damages for violations of their constitutional rights. Plaintiffs alleged the following federal questions arising directly from the Constitution: (1) inverse condemnation, (2) procedural due process, (3) substantive due process, (4) equal protection, (5) involuntary servitude; the following federal questions based on

federal statutes: (6) 42 U.S.C. Sec. 1983, (7) 42 U.S.C. Sec. 1985, (8) 42 U.S.C. Sec. 1994; and the following state causes of action pendent to the federal causes of action: (1) violation of Kansas Constitution art. 2, Sec. 17, (2) unjust enrichment.¹

On July 1, 1988, the State adopted a new indigent defense services system which made representation voluntary and increased the hourly fee to \$50.00 per hour with supposedly no caps or fee reductions due to budget constraints which had existed under the Act. To fund this new system, the State Board's annual budget was increased by more than \$2,000,000.00 This mooted Plaintiffs' suit for injunctive relief, and the remaining damage suit in federal court was dismissed on Eleventh Amendment grounds. *See Appendix 2.*

Plaintiffs then appealed to the United States Court of Appeals for the Tenth Circuit, arguing that a state can be sued in federal court by its own citizens and to the extent that *Hans v. Louisiana*, 134 U.S. 1 (1890), was contrary and continued to be good law, it should be overruled; (2) congressional abrogation of the Eleventh Amendment; (3) constitutional abrogation of the Eleventh Amendment;

¹ Since Plaintiffs' Complaint was filed, this Court has precluded the § 1983 and 1985 claims in *Will v. Michigan Dept. of State Police*, ___ U.S. ___, 109 S. Ct. 2304 (1989). However, if jurisdiction were maintained in federal court, and discovery allowed, Plaintiffs believe that additional federal and state causes of action could be raised.

and (4) pendent jurisdiction of the state claims involving non-discretionary duties of state officials.²

The United States Court of Appeals for the Tenth Circuit held that *Hans* would "not be overruled absent special justification for such departure from the doctrine of *stare decisis*." (citing *Welch v. Texas Dept. of Highways & Pub. Transp.*, 438 U.S. 468, 478-88 (1987)), and furthermore that only this Court could overrule *Hans*. The other Eleventh Amendment issues, without discussion, were found to be without merit.

Plaintiffs timely petitioned this Court for certiorari.

² Plaintiffs also filed a Class Action Petition in state district court raising similar causes of action for damages. Despite the factual and legal findings in *Smith*, the Kansas Supreme Court held that, absent federal statutory enforcement, a State could not be sued for damages for violating the procedural due process, substantive due process, equal protection, and involuntary servitude clauses. The Kansas Supreme Court also held there were no federal statutory actions because the Section 1983 and 1985 causes of action were not available after *Will* and Section 1994 did not apply because Plaintiffs would not be imprisoned if they did not serve. Despite *First Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), the Kansas Supreme Court further held that Plaintiffs' Fifth Amendment "property" could be taken without just compensation because the Fifth Amendment only required just compensation for the taking of real property, so invalidation of the old court appointment system was all that was constitutionally required. On procedural grounds, the state unjust enrichment claim was denied. The Kansas Supreme Court held in summary that even though the old court appointment system violated various provisions of the Constitution, only equitable (injunctive) relief, not damages, was available. *Sharp v. State*, 245 Kan. 749, 783 P.2d 343 (1989), *reh'g. denied*, (1990), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. June 12, 1990) (No. 89-1978).

REASONS FOR GRANTING THE WRIT INTRODUCTION

The inquiry in this case is limited to a determination of whether the federal district court had jurisdiction. Whether Plaintiffs' allegations state a claim upon which relief can be granted is beside the point at this stage of the case. *Bell v. Hood*, 327 U.S. 678, 682 (1946).

I. A STATE CAN BE SUED BY ITS OWN CITIZENS FOR DAMAGES IN FEDERAL COURT.

Where you can sue is often outcome determinative. This case is a prime example. The Kansas Supreme Court unanimously held in *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816 (1987), that the State of Kansas was violating the constitutional rights of Kansas rural lawyers, and therefore granted injunctive relief. However, on the same facts, the Kansas Supreme Court ruled that only prospective relief was available. The State did not have to pay for just compensation for taking property or damages for violating the constitutional rights of its citizens. *Sharp v. Kansas*, 245 Kan. 749, 783 P.2d 343 (1989), *reh'g. denied*, (1990), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. June 12, 1990) (No. 89-1978). The net effect is that Plaintiffs' constitutional rights have been violated, Plaintiffs' property taken, and the State unjustly enriched by approximately \$2 million per year. Fundamental fairness and the Constitution require more. An unbiased forum is the answer.

I.

A. Strict Construction Of The Unambiguous Text Of The Eleventh Amendment Is Appropriate.

The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States *by Citizens of another State, or by Citizens or Subjects of any Foreign State.*

U.S. Const. amend. XI (emphasis added). Out-of-staters ("Citizens of another State" or "Citizens or Subjects of a Foreign State") are barred from federal court jurisdiction, — and in-staters are not.

The Eleventh Amendment should be strictly construed for the same reason that Art. III, Sec. 2, from which the language in the Eleventh Amendment was borrowed, is:

The precision which characterizes . . . Article III is in striking contrast to the impression of so many other provisions of the Constitution dealing with other very vital aspects of government. This was not due to chance or ineptitude on the part of the Framers. The differences in subject-matter account for the drastic difference in treatment. Great concepts like "Commerce . . . among the several States," "due process of law," "liberty," "property" were purposely left to gather meaning from experience . . . but when the Constitution in turn gives strict definition of power or specific limitations upon it we can not extend the definition or remove the translation.

National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646-47 (1949) (Frankfurter, J., dissenting). "The language of the eleventh amendment does not include the term 'sovereign immunity' or anything resembling it." Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 Harv. L. Rev. 61, 67 (1984) (comparing Tenth and Eleventh Amendment). Justice Stevens noted that "[p]lainer language is seldom, if ever, found in constitutional law." *Pennsylvania v. Union Gas Co.*, 491 U.S. ___, 105 L.Ed.2d 1, 23 (1989) (Stevens, J., concurring). Therefore, there is no reason to resort to extrinsic evidence to determine the intent of the Eleventh Amendment.

B. Apart From The Text, The Congressional Purpose Of The Eleventh Amendment Is Ambiguous.

Determining the purpose of a constitutional amendment, other than from the text which is considered and voted on by all involved, would be virtually impossible. Just divining a clear purpose or intent from a modern day Congress is difficult. "Committee reports, floor speeches, and even colloquies between congressmen are frail substitutes for bicameral vote upon the text of a law." *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring). Multiply that difficulty by numerous ratifying state legislatures that do not convene as a group or share documents like Congress, and the chances of finding a clear purpose of the whole by examining small parts of the whole becomes much like the parable of the blind men describing an elephant.

Countless hours of research have been devoted to determining the constitutional history and intent behind the Eleventh Amendment. Suffice it to say that a majority of the Court and commentators have concluded that: "At most, then, the historical materials show that – to the extent this question was debated – the intentions of the Framers and Ratifiers were ambiguous." *Welch*, 483 U.S. at 483-84 (Powell, J., writing plurality opinion, joined by J.J. Rehnquist, White, and O'Connor). *See also Id.* at 495 n. 28; *Union Gas Co.*, 491 U.S. ___, 105 L.Ed.2d at 22 n. 1 (Stevens, J., dissenting) (citing eight law review articles). Justices Brennan, Marshall, Blackmun, and Stevens have long held that *Hans* "rests on flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 248 (1985) (Brennan, J., dissenting, joined by J.J. Marshall, Blackmun, and Stevens). Justices Scalia and Kennedy argue that *Hans* is historically correct, but admit that "it cannot possibly be denied that the question is a close one." *Union Gas*, 105 L.Ed.2d at 37 (Scalia, J., dissenting, joined by J.J. Kennedy, O'Connor, and Rehnquist).

C. *Hans* Is Bad Law Because It Creates Constitutional Law, Instead Of Interpreting It, By Ignoring The Text Of The Eleventh Amendment And Relying On The Ambiguous Constitutional Purpose.

Hans was a political, not legal, decision. The political exigencies when *Hans* was decided may make the reason

for fashioning the bad law understandable, but as a continuing legal precedent, especially of a fundamental constitutional doctrine, *Hans* is unacceptable.

Hans was and is bad law. *Hans* recognized that the text of the Eleventh Amendment "only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign state. It is true, the Amendment does so read. . . ." 134 U.S. at 10. Nonetheless, the *Hans* Court did not construe the text, find it ambiguous, or interpret a general concept embodied in the text. Rather, the *Hans* Court totally ignored the text and constitutionalized its own general concept of state litigation immunity from federal courts by relying solely on what is now acknowledges to be an ambiguous history. But cf. *Dellmuth v. Muth*, 491 U.S. ___, 105 L.Ed.2d 181, 189 (1989) (adopting very strict canon of construction with text all important and legislative history irrelevant); *INS v. Cardozo-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J., concurring) ("Where the language of [the] laws is clear, we are not free to replace it with unenacted legislative intent."). Accordingly, *Hans* and the "Court's Eleventh Amendment jurisprudence is not supported by history or by sound legal reasoning; it is simply bad law. In matters of such great institutional importance as this, *stare decisis* must yield." *Papasan v. Allain*, 478 U.S. 265, 293 (1986) (Brennan, J., dissenting, joined by J.J. Marshall, Blackmun, and Stevens).

D. *Stare Decisis* Is Not A Sufficient Reason To Maintain The Bad Constitutional Law Created by *Hans* And Its Progeny.

Hans and its progeny, though bad law, continue to have some vitality based on the doctrine of *stare decisis*.

See *Welch*, 483 U.S. at 479, 494-95; *Union Gas*, 105 L.Ed.2d at 37. Generally, "any departure from the doctrine of *stare decisis* demands special justification." *Welch*, 483 U.S. at 479 (citation omitted). But the doctrine of *stare decisis* "is not rigidly observed in constitutional cases." *Id.* Whether the doctrine of *stare decisis* in constitutional cases demands lesser justifications is not clear. Perhaps an unambiguous constitutional doctrine should always, or at least presumptively, prevail over an unconstitutional doctrine. Nonetheless, there are special justifications for overruling *Hans*.

The reasons behind the doctrine of *stare decisis* do not support the *Hans* doctrine. There are two main reasons for giving continuing validity to a plainly erroneous decision: (1) the force of reasoning in the old opinion; and, (2) continuing the certainty of an established legal principle. However, the force of reasoning, or lack thereof, in *Hans* is a primary reason for abandoning it. *Hans* misconstrued (or ignored) the law, and is inconsistent with the unambiguous text of the Eleventh Amendment. Second, the recently fragmented, plurality opinions, and the numerous 5-4 decisions of this Court before that, show that there is no continuing certainty to the *Hans* legal principle. Likewise, the complex, inconsistent, and every-expanding exceptions which now threaten to swallow the general rule announced in *Hans* and render it a nullity also demonstrate that *Hans* does not lend continued certainty to the law. Moreover, since the *Hans* doctrine with all of its exceptions has been so uncertain, it is doubtful that Congress would (or could) have relied on it. Even those who believe the end achieved by *Hans* is justified admit it is now "[b]etter to overrule *Hans* . . . than to

perpetuate the complexities it creates. . . . We shall either overrule *Hans* in form as well as in fact, or return to its genuine meaning." *Union Gas*, 105 L.Ed.2d at 38, 43 (Scalia, J., dissenting, joined by J. J. Rehnquist, O'Connor, and Kennedy).

E. *Hans* Should Be Replaced By The Unambiguous Text Of The Eleventh Amendment.

The Eleventh Amendment involves "competing values of state immunity from federal suit and state accountability within the constitutional system." L. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 Harv. L. Rev. 1342, 1345 (1989). The conservative approach (state immunity) is represented by the "*Hans*/sovereign immunity theory" while the liberal approach (state accountability) is found in the "diversity theory" which precludes federal jurisdiction against states only when the sole basis of federal jurisdiction is diversity of citizenship, so all federal questions and admiralty cases could be brought in federal court. In their pure form, both the liberal and conservative approaches have good arguments for and against them. But it is unnecessary to choose one of the extreme positions when the text of the Eleventh Amendment presents a workable, truly constitutional compromise. Like most compromises in the Constitution, neither liberals nor conservatives will be entirely happy with the compromise, but most can live with it. Under the textual compromise, in-staters will be treated as if the diversity theory were adopted, while out-of-staters will be treated as if the *Hans*/sovereign immunity theory were adopted. The net result will be a clean, workable doctrine.

Without discussing why, the *Hans* Court "supposed" that it would be anomalous to treat in-staters and out-of-staters differently. 134 U.S. at 15. But it was not anomalous then, and it is not now. Even if it was anomalous, it would not be sufficient to overcome the plain meaning of the Eleventh Amendment. As Chief Justice Marshall stated:

But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.

Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202-03 (1819).

Allowing in-staters access to federal court, and out-of-staters no access, made sense when the Eleventh Amendment was adopted. No one doubts that the Eleventh Amendment was a reaction to *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which created a fear that out-of-staters would sue states to recover property taken by the Colonies during the Revolutionary War and thereby force states to substantially raise taxes. The Eleventh Amendment surgically removed that fear. Today, most state violations affecting individuals involve in-state citizens. Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1478 n. 214 (1987). "Given the relatively immobile nature of society in the 1790's, this was even more true at the time of the [Eleventh] Amendment . . ." L. Marshall, *supra*, at 368. Besides, having recently obtained the Bill of Rights,

it is doubtful that in-state voters would have ratified the amendment if it immunized states from their lawsuits to protect their most valued rights.

The so-called anomaly makes even more sense today. Not only do most state violations of individual rights occur to in-staters today, but also the largest constitutional violations tend to be against in-staters. Out-of-staters usually are subject to a one-shot tort or breach of contract which are usually small in number and often small in amount, so that the political ramifications, and therefore possibility of prejudice in the state courts, are very little. In-staters, however, can have their constitutional rights violated continuously for a long period of time, such as in unconstitutional taxes or regulations, resulting in large class action suits brought by "political minorities", persons based on race, religion, geographic location, age, wealth, or business association that lack sufficient political clout to avoid the unconstitutional legislation in the first place.

Out-of-staters also have alternatives which in-staters do not have. In the unlikely event that an out-of-staters' federal rights are violated, he can drive home and not face a continued violation. An out-of-stater can often sue the offending state in his own home state. *Nevada v. Hall*, 440 U.S. 410 (1979). When the alleged anomaly is balanced against the suggested pernicious effect of the sovereign immunity doctrine, it becomes evident that the textual approach makes good sense, and the anomaly is not so certain, or so substantial, that the unambiguous text should be ignored.

F. The Textual Approach Is A More Workable Doctrine Than *Hans* And Its Exceptions.

If it is ever appropriate to rely on the Court's cost/benefit analysis to decide whether to give effect to unambiguous constitutional text, then the Court should adopt the textual approach to the Eleventh Amendment because it is a better system than the status quo.

Hans may fall of its own weight because with its numerous, inconsistent exceptions, *Hans* is "too much at war with itself to endure." *Union Gas*, 105 L.Ed.2d at 43 (Scalia, J., dissenting). Thus, it is inevitable that the constitutional doctrine will change yet again which inevitably means overruling or bring into question some past cases.

There is concern that if *Hans* is overruled 17 cases would also be overruled. *Welch*, 483 U.S. at 494 n. 28. The concern is overblown. *Jackson, The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 119-24 (1988). Moreover, the list of cases was compiled under the belief that the change would be to the diversity theory. But under the textual approach, the general principle of sovereign immunity will not be extinguished and many of the 17 cases therefore will not be as severely affected. More cases, without cause for alarm, were potentially at risk when *Pennhurst* changed the law. See *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 165-66 (1984). Moreover, looking to future cases, the legal effect of not overruling *Hans* would be worse.

A state's fisc should not be adversely effected by the change to the textual approach since they are already liable for damages under existing federal causes of action,

just not in federal court. States that have been fairly adjudicating federal claims in state court will find the net result of a fair adjudication in federal court to be nil. Of course, for state courts that were biased and unfair, a change to federal court is warranted despite any adverse fiscal impact. Other governmental entities can serve as an example. Counties and cities lost federal court immunity long ago, and they have not gone broke. States will not even be inconvenienced. States already litigate in federal court in suits they bring and under *Hans* exceptions. In short, states will not be adversely affected, unless they are now ignoring federal rights in their own courts, in which case a change is warranted.

Federal courts would be better served by the doctrinal change. *Hans* and its exceptions now tie up federal courts deciding jurisdictional matters instead of the merits of cases.

The public would clearly benefit from the textual approach. In-staters will benefit either by receiving an unbiased forum where they did not before or have their fears, however unfounded, allayed that they were not being consciously or subconsciously discriminated against in a state court by a state judge dependent on the state legislature or executive branch for his salary and promotion. The State should not be defendant and judge when it can be avoided. In-staters will no longer have to file two suits, prospective relief in federal court and a damage action in state court, thereby economizing judicial and litigant resources. But perhaps the biggest benefit will be the end of the legal gymnastics associated with *Hans* and its exceptions which erode public confidence in the courts and Constitution. Honoring the text of the

Eleventh Amendment will permit the rule of law, not of men, to rein supreme again. Accordingly, the judicially created *Hans* doctrine should be overruled, and, the Eleventh Amendment constitutional doctrine should be determined by giving effect to the clear and unambiguous text of the Eleventh Amendment itself.

II. IF HANS IS STILL CONTROLLING PRECEDENT, THEN CONGRESS ABROGATED STATE IMMUNITY TO FEDERAL COURT JURISDICTION BY PASSING 42 U.S.C. §1994.

If the extreme rule of *Hans* survives, then two of its many exceptions apply to the instant case – congressional abrogation and constitutional abrogation. Congress by passing 42 U.S.C. §1994 abrogated the Eleventh Amendment immunity.

For congressional abrogation, “evidence of congressional intent must be both unequivocal and textual. . . . Legislative history generally will be irrelevant. . . . If Congress’ intention is ‘unmistakably clear in the language of the statute,’ recourse to legislative history will be unnecessary; if Congress’ intention is not unmistakably clear, recourse to legislative history will be unnecessary. . . .” *Muth*, 105 L.Ed.2d at 184.³

³ Although “generally” irrelevant, legislative history may still be relevant in some contexts. See *Muth*, 105 L.Ed. 2d at 194-97 (Brennan, J., dissenting, joined by J.J. Marshall, Blackman, and Stevens). If relevant, §1994 was intended to enforce the Thirteenth Amendment, which was “intended to be a limitation on the power of the States.” *Fitzpatrick v. Bitzer*, 427 U.S.

(Continued on following page)

But the application of the "unequivocal text" test is unclear. Since textual clarity in congressional statutes runs the gamut, where will the line be drawn between unequivocal and equivocal? Second, does the stringency of the unequivocal text test rise and fall depending on when the congressional act in question is passed in relation to the evolving Eleventh Amendment doctrine, particularly the congressional abrogation exception. *See Muth*, 105 L.Ed.2d at 194-97 (Justices Brennan, Marshall, Blackmun and Stevens criticizing the retroactive application of the unequivocal text test).

No doubt the actual wording of the federal statute in question will have to be examined in each case to decide if the text unequivocally abrogates the Eleventh Amendment. But to date, a majority of the Court has not agreed on general guidelines or factors to look for in making the decision. Justices Kennedy, Rehnquist, White, and O'Connor noted that the statute in *Muth* "makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity." *Id.* at 190. But congressional abrogation may be possible even "without explicit reference to state sovereign immunity or the Eleventh Amendment." *Id.* at 191 (Scalia, J. concurring). Indeed, the statute approved as abrogating sovereign immunity in *Union Gas* had no such provisions.

The statute in *Muth*, the Education of the Handicapped Act (EHA), 20 U.S.C. Section 1400 *et seq*, only

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445, 454 (1976). Congress, in passing Section 1994 during the Reconstruction Era, must have intended enforcement in a federal judicial forum.

made "frequent references to the States [which] make the States, along with local agencies, logical defendants in suits alleging violations of the EHA." *Id.* 190. From the fact that States could be sued under the EHA, the majority found only a "permissible inference", but not an unequivocal declaration, that such suits against the States could be for monetary damages. *Id.* Section 1994, however, does more than create a permissible inference that States can be sued for damages.

As for a varying stringency to the test, Congress should be held to the clarity required in the evolution of the congressional abrogation exception that existed at the time Congress passed the statute in question. By 1985 it was evident that Congress could abrogate the Eleventh Amendment "only by making its intention unmistakably clear in the language of the statute." *Atascadero*, 473 U.S. 242. But there is no need for Plaintiffs herein to argue, or this Court to decide in this case, what the unequivocal text test over the years before 1985 might be because § 1994 predates the entire history of *Hans* and its exceptions.

Section 1994 was passed in 1867, generations before the congressional abrogation exception was created, and 23 years before *Hans*. When § 1994 was passed, there was no *Hans* rule or special constitutional concerns to abrogate. Therefore, Congress could not have been expected to even address the abrogation issue in the text or the legislative history. Nonetheless, § 1994 shows that States are subject to federal court intervention, especially when its legislative history and circumstances surrounding its passage are taken into account. *See supra* note 3.

Like the Fourteenth Amendment enforcement statute in *Fitzpatrick*, § 1994 is congressional enforcement legislation to the Thirteenth Amendment which was intended to limit the power of the states. Accordingly, even the narrow concept of congressional abrogation announced in *Fitzpatrick* is sufficient to sustain jurisdiction in this case.

If it were necessary (or proper) to examine § 1994 under the unequivocal text standard, federal court jurisdiction is still appropriate. Section 1994 specifically restricts state action by barring "any act, laws, resolutions; orders; regulations; or usages of any Territory or State." Section 1994 also provides in its text for a damage action. Both *past* and future state conduct are outlawed. Section 1994 bars state laws "heretofore established" or "shall hereafter be made". The primary, if not the sole, remedy for enforcing *past* state conduct is damages. See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 402 U.S. 388, 395 (1977). See also 45 Am. Jur. 2d *Involuntary Servitude* § 12, at 940 (damages may be recovered in a civil action under § 1994); *Santiago v. City of Philadelphia*, 435 F.Supp. 136, 156-57 (1977) (finding federal court jurisdiction over § 1994 damage action). Therefore, Section 1994 is sufficient to overcome any impediment to federal suit caused by the subsequently adopted *Hans* doctrine.

III. IF HANS IS STILL CONTROLLING PRECEDENT, THEN THE STATES' IMMUNITY TO FEDERAL COURT JURISDICTION WAS ABROGATED BY CONSTITUTIONAL AMENDMENTS SPECIFICALLY INTENDED TO LIMIT STATE ACTION, SUCH AS THE FIFTH, THIRTEENTH, AND FOURTEENTH AMENDMENTS.

Since the Eleventh Amendment can be abrogated indirectly by Congress passing statutes pursuant to a

Constitutional grant of power, the Constitution itself, as the source of the power, must be able to abrogate the Eleventh Amendment directly.

A. The Justifications Given For The Congressional Abrogation Exception Also Support The Constitutional Abrogation Exception.

Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy reject a general congressional abrogation exception because Congress could render sovereign immunity a practical nullity, but they accept a limited congressional abrogation exception when Congress legislates pursuant to the Fourteenth Amendment. *Union Gas*, 105 L.Ed.2d at 41-42.

Justices Brennan, Marshall, Blackmun, and Stevens, assuming *arguendo* that *Hans* is a valid constitutional concept, believe that the congressional abrogation theory is justified because "States gave their consent all at once in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis. . . . In approving the Commerce Power, the States consented to suits against them based on congressionally created causes of action." *Union Gas*, 105 L.Ed. 2d at 19, 21. See also *Id.* at 33 (White, J., concurring in congressional abrogation under Commerce Clause, but not stating why other than disagreeing with much of Justice Brennan's reasoning).

All of the "jusifications" support the recognition of a constitutional abrogation exception.⁴ Regardless of

⁴ Since the Eleventh Amendment provides that the "judicial power . . . shall not be construed . . ." and courts
(Continued on following page)

whether all pre- or post-Eleventh Amendment powers enable congressional abrogation, virtually every Justice agrees that *Fitzpatrick* is still good law, so the Fourteenth Amendment, which was intended to limit the power of the States and enlarge the power of Congress, can be used to abrogate the Eleventh Amendment immunity. *Union Gas*, 105 L.Ed.2d at 17, 33, 41-42. Since the alleged constitutional causes of action in this case – inverse condemnation, substantive and procedural due process, equal protection, and involuntary servitude – arise from the Thirteenth and Fourteenth Amendments, as well as the Fifth Amendment which is also directed at the states, federal courts have jurisdiction to consider the merits of Plaintiffs' constitutional claims.

Other constitutional powers, especially post-Eleventh Amendment, should be sufficient to overcome the sovereign immunity when asserted direct, since even though a federal statute cannot overcome a constitutional provision, a subsequently adopted constitutional provision can. The consent justification, being less strict, also

(Continued from previous page)

"construe" the Constitution, whereas States by ratifying amendments and Congress by passing legislation "make" federal law, "[c]ommentators take the view that nothing in the language of the Eleventh Amendment limits congressional power, as distinguished from judicial power, to abrogate the States' immunity." *County of Monroe v. Florida*, 678 F.2d 1124, 1132 n. 8 (four law review citations omitted). See also Tribe, *American Constitutional Law* § 3-37, page 139. Thus, the Eleventh Amendment may not even apply to limit federal jurisdiction when Congress or the States approve the jurisdiction over the States.

supports the constitutional abrogation exception in the instant case.

B. The Constitutional Abrogation Exception Would Be A Small Exception.

The constitutional abrogation exception would be a small exception because it would be limited to constitutional provisions (and perhaps post-Eleventh Amendment) which: (1) unequivocally restrict state action, and (2) create a private cause of action for damages absent enforcing legislation. Only the following amendments ratified after the Eleventh Amendment are clearly intended to limit state action and provide individual rights: Thirteenth, Fourteenth, Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth. *See Fitzpatrick*, 427 U.S. at 454 (Thirteenth Amendment intended to limit State power). The main pre-Eleventh Amendment restrictions on the states which also declare individual rights are the Bill of Rights. Although the text of the Bill of Rights does not limit state action, the Bill of Rights is applicable to the states through the Fourteenth Amendment. Therefore, the Bill of Rights could be a potential constitutional abrogation source.

When the second prong of limitations is imposed, however, very few constitutional provisions, pre- or post-Eleventh Amendment, would fall within the constitutional abrogation exception. Other than the Fifth Amendment inverse condemnation damage action recognized in *First Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), and the procedural due process damage action recognized in *Carey v. Piphus*, 435 U.S. 247 (1978), all

direct constitutional damage actions would have to be *Bivens* actions. See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 402 U.S. 388 (1977). *Bivens* actions have only been recognized under the following constitutional provisions: First, Fourth, Fifth, Eighth, Thirteenth, and Fourteenth.⁵ Thus, the constitutional abrogation exception would be even smaller than the congressional abrogation exception and probably somewhat overlapping. For purposes of this case, only the most important and fundamental limitations on states – the Fifth, Thirteenth, and Fourteenth Amendments – need be, and should be, recognized as abrogating the Eleventh Amendment.

C. The Constitutional Abrogation Exception Has Already Been Recognized.

“The States may be considered to have waived their immunities and consented to such suits in federal court

⁵ See *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977) (First Amendment); *Yiamouyannis v. Chemical Abstracts Service*, 521 F.2d 1392 (6th Cir. 1975), cert. denied, 439 U.S. 483 (1978) (same); *Bivens*, 402 U.S. 388 (Fourth Amendment); *United States ex rel. Moore v. Koelzer*, 457 F.2d 892 (3d Cir. 1972) (Fifth Amendment); *Low v. Armistead*, 482 F.2d 1291 (4th Cir. 1978), cert. denied, 446 U.S. 928 (1980) (same); *Jim Young v. Missouri State Highway Commission*, 56 F.R.D. 38 (W.D. Mo. 1971) (same); *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment); *Davis v. Passman*, 422 U.S. 228 (1979) (substantive due process clause); *Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1985) (Thirteenth and Fourteenth Amendments); *Brault v. Town of Milton*, 527 F.2d 730, rev'd on other grounds, 527 F.2d 736 (2d Cir. 1975) (en banc) (Fourteenth Amendment); *Owen v. City of Independence*, 560 F.2d 927 (8th Cir. 1977) (same); *Gentile v. Wallen*, 562 F.2d 193 (2d Cir. 1977) (same); *Ellis v. Blum*, 643 F.2d 68, 83-84 (2d Cir. 1981) (same); *Santiago v. N.Y.S. Dept. of Correction Services*, 725 F.Supp. 780, 788-89 (S.D.N.Y. 1989) (same).

through ratification of the Fourteenth Amendment. . . . Moreover, States' Eleventh Amendment insulation must necessarily be understood to have been modified by the dictates of the subsequently enacted Fourteenth Amendment." *Familias Unidas v. Briscoe*, 619 F.2d 391, 405 (5th Cir. 1980) (citations omitted); *Native Village of Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1990) (U.S. Const. art. I, § 8); *Santiago v. N.Y.S. Dept. of Correctional Services*, 725 F.Supp. 780 (S.D.N.Y. 1989) (Fourteenth Amendment). See also Tribe, *supra* Section 3-37 (1978).

Plaintiff's counsel in *Milliken v. Bradley*, 433 U.S. 267 (1977), argued that "Section One of the Fourteenth Amendment, both *in its direct impact* and as enforced by Congress. . . . supersedes the Eleventh Amendment." 53 L.Ed.2d at 1225 (Brief for Plaintiff) (citations omitted) (emphasis added). This Court has previously suggested that the constitutional abrogation theory is viable. Although ultimately decided on other grounds, *Ex Parte Young*, 209 U.S. 123 (1908) stated:

We think that whatever the rights of complainants may be, they are largely founded on [the Fourteenth] Amendment, but a decision of this case does not require an examination or decision of the question of whether its adoption in any way altered or limited the effect of the [Eleventh] Amendment.

Id. at 150. See also *Edelman v. Jordan*, 415 U.S. 651, 667 n.1, 694 n.2 (1974).

Although the case was dismissed before this Court had the opportunity to address it, the constitutional abrogation theory was presented as:

Does Fourteenth Amendment, of its own force, constitute limitations on sovereign immunity bar of Eleventh Amendment so that, even absent specific statutory declaration authorizing money judgment against state in suit brought to enforce Fourteenth Amendment rights, federal court may enter judgment awarding money damages against state where, in its discretion, such relief is necessary and appropriate to fully vindicate constitutional rights to deter future violations of constitutional proscriptions?

Rabinovitch v. Nyquist, 433 U.S. 901 (1977) (appeal dismissed) (issue cited at 45 U.S.L.W. 3007 (U.S. July 13, 1976) (No. 75-1809)).

The *Pennhurst* Court also eluded to the constitutional abrogation exception:

The District Court also rested its decision on the Eighth and Fourteenth Amendments and Section 504 of the Rehabilitation Act of 1973. . . . on remand the Court of Appeals may consider to what extent, if any, the judgment may be sustained on these bases. On the Fourteenth Amendment issue, the Court should consider *Youngberg v. Romeo*, 457 U.S. 307, . . . (1982), a decision that was not available when the District Court issued its decision.

465 U.S. at 125 n. 35. *Youngberg* was a companion case to *Pennhurst*. In *Youngberg*, a mentally retarded person who was involuntarily committed to *Pennhurst*, a Pennsylvania state institution, was held to have a protected liberty interest under the due process clause of the Fourteenth Amendment which imposed certain duties on the State. Notably, Plaintiff in *Youngberg* had dropped all claims for injunctive relief and was seeking a class action for damages alone. 457 U.S. at 311. This Court in *Youngberg* while

finding a violation of the Fourteenth Amendment never mentioned any restrictions on its holding due to the Eleventh Amendment.⁶ See also *Shapiro v. Thompson*, 394 U.S. 618 (1969) (same). By referring to *Youngberg* in *Pennhurst*, this Court insinuated that federal courts have jurisdiction to hear Fourteenth Amendment violations by States even if the case is for money damages.

IV. IF FEDERAL COURT JURISDICTION EXISTS OVER A FEDERAL QUESTION, THE FEDERAL COURT ALSO HAS JURISDICTION OF THE PENDENT STATE CLAIMS INVOLVING STATE NON-DISCRETIONARY DUTIES.

After obtaining jurisdiction over a federal claim, a federal district court can adjudicate other related state law claims. See, e.g., *Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Indeed, a federal court can and, to avoid federal constitutional issues, should resolve a case solely on the basis of a pendent state law claim. See, e.g., *Siler v. Louisville & N.R. Co.*, 213 U.S. 175, 192-93 (1909). Although this Court recognized a limitation to pendent jurisdiction in *Pennhurst*, the limitation does not apply to the instant case.

In *Pennhurst*, a Pennsylvania resident, on behalf of a class, sued a Pennsylvania run mental health facility alleging violations of the federal Constitution and a Pennsylvania statute. The Pennsylvania statute gave the

⁶ The federal courts below in *Pennhurst* never decided the constitutional abrogation issue because the state settled the class action suit which was approved by the trial court. *Halderman v. Pennhurst*, 610 F.Supp. 1221 (D.C.Pa. 1985).

operators of the mental health institution broad discretion to provide "adequate" mental health services. 465 U.S. at 101 n. 11. Concerned with federal courts interfering with discretionary state functions, this Court held that pendent state court jurisdiction "may not be predicated on violations of state statutes that command purely discretionary duties." *Id.* at 110 (footnote omitted).

This case, however, does not involve the same federalism concern because purely discretionary state duties are not involved. The *Smith* court has already found that the violations alleged in this case were ministerial duties required by state law. 242 Kan. at 349-56. Therefore, this case belongs in federal court on the federal claims and related, non-discretionary state law claims.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Petition for a Writ of Certiorari be granted, the opinion below reversed, and the case remanded to federal district court for discovery and trial on the merits.

Respectfully submitted,
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Counsel of Record
for Petitioners

App. 1a

APPENDIX 1
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REX A. SHARP; KEITH WILSON;)	
JAMES H. MORAIN; DANIEL H.)	
DIEPENBROCK; TAMMIE E. KURTH,)	
as individuals; NEUBAUER, SHARP,)	
MCQUEEN, DREILING & MORAIN,)	No. 88-1553
P.A., as a firm, and ALL OTHER)	(D.C. No.
LAWYERS AS A CLASS REQUIRED)	88-1001)
BY THE STATE OF KANSAS TO)	(D. Kan.)
REPRESENT KANSAS INDIGENT)	
CRIMINAL DEFENDANTS,)	FILED
Plaintiffs-Appellants,)	MAY 2 1990
v.)	
STATE OF KANSAS,)	
Defendant-Appellee.)	

ORDER AND JUDGMENT*

Before McKAY, BARRETT, Circuit Judges, and KANE,**
District Judge.

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

**Honorable John L. Kane, Senior District Judge, United States District Court for the District of Colorado, sitting by designation.

App. 1b

Plaintiffs-appellants are attorneys who have provided legal services to indigent criminal defendants pursuant to the Indigent Defense Services Act, Kan. Stat. Ann. §§ 22-4501 through -4536 (1988).

On December 15, 1987, the Kansas Supreme Court held that the court appointment system was constitutionally defective. *State ex rel. Stephan v. Smith*, 242 Kan. 336, 747 P.2d 816, 849-50 (1987). The court ordered the state district court to continue a modified system of appointment until July 1, 1988. *See also Sharp v. Kansas*, 245 Kan. 749, 783 P.2d 343, 348 (1989) (affirming summary judgment against appellants' claims in state court).¹

Subsequently, appellants initiated suit against the State of Kansas seeking retrospective relief (past money damages) and prospective relief (mandamus order concerning fees to be paid in the future). Appellants alleged continuing constitutional violations. The district court dismissed the case on eleventh amendment grounds. We affirm.

The eleventh amendment embodies a broad constitutional principle of sovereign immunity, and the long line of Supreme Court cases, starting with *Hans v. Louisiana*, 134 U.S. 1 (1890), which have applied eleventh amendment immunity to suits by a citizen against its own state, will not be overruled absent special justification for such departure from the doctrine of *stare decisis*. *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478-88

¹ Appellant's motion to strike appellee's statement of supplemental authority filed January 2, 1990, is hereby denied.

App. 1c

(1987). Only the United States Supreme Court may overrule its own precedent. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983). Unless and until such change of direction is issued by the Supreme Court, this court is bound by the *Welch* holding.

State waiver of sovereign immunity, e.g., by statutory provision, is one exception to a strict application of eleventh amendment sovereign immunity. However, "a State will be deemed to have waived its immunity only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (quotations omitted). The State of Kansas has made no such waiver to expose itself to the plaintiffs' claims. Plaintiffs' arguments for lifting the eleventh amendment bar are without merit.

We have also considered the congressional abrogation and pendent state claims arguments raised by appellant and find them to be without merit.

The judgment of the United States District Court for the District of Kansas is AFFIRMED.

ENTERED FOR THE COURT
PER CURIAM

APPENDIX 2
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

REX A SHARP, et al.,)	
)	Plaintiffs,
))
v.))
THE STATE OF KANSAS,))
))
)	Defendant.
))

Case No.:
88-1001-K

FILED
MAR 22 '88

ORDER

This case is now before the Court upon defendants' motion to dismiss. Both parties have submitted written and oral arguments on the motion. The Court, having considered the arguments of counsel, is now prepared to rule.

Defendant's motion to dismiss is based on the immunity from federal court jurisdiction granted states under the Eleventh Amendment. Current law holds that this jurisdictional bar is absolute. See, *Barger v. State of Kansas*, 620 F.Supp. 1432 (D. Kan. 1985); *Vakas v. Rodriguez*, 728 F.2d 1293 (10th Cir. 1984); *Edelman v. Jordan*, 415 U.S. 651 (1974).

Thus, we agree with defendant that the State of Kansas is immune from suit in this Court, and this case is dismissed for lack of subject matter jurisdiction without prejudice.

Plaintiffs are given leave to amend their complaint. All scheduling deadlines and other motions in this case

App. 2b

currently before the Court are deemed to be no longer viable. Following the filing and service of an amended complaint, new scheduling deadlines and motions will be considered by the Court.

IT IS SO ORDERED.

DATED this 23rd day of March, 1988, at Wichita,
Kansas.

/s/ Patrick F. Kelly
UNITED STATES DISTRICT
JUDGE

PREPARED BY:

ROBERT T. STEPHAN

Attorney General

/s/ John W. Campbell

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